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No. 06-714

# In the Supreme Court of the United States

ANGEL MORALES,

*Petitioner,*

v.

JOSEPH SMITH,

*Respondent.*

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

**Question 1.** Mr. Morales has constitutional rights to a fair trial and to present a defense by confronting witnesses against him. Nonetheless, the trial court prohibited him from confronting the prosecution's expert even though she wrongfully testified that fingerprint evidence cannot be fabricated. The only evidence against Mr. Morales was a single fingerprint. Consequently, the jury erroneously believed that the fingerprint evidence could not have been fabricated. Did the trial court violate Mr. Morales's constitutional rights thereby entitling him to habeas corpus relief?

**Question 2.** Mr. Morales has the constitutional right to call witnesses to further his defense. Despite extremely limited evidence against him and the prosecution expert's erroneous testimony that fingerprint evidence cannot be fabricated, the trial court prohibited Mr. Morales from calling a defense expert to establish: (i) that the errors in the method of collection described by Officer Curtis precluded verification of the source of the fingerprint; (ii) that under similar circumstances to those presented here, fingerprint evidence can be, and indeed has been, fabricated by law enforcement officials; and (iii) reasonable doubt. Did the trial court violate Mr. Morales's constitutional rights requiring habeas corpus relief?

## PARTIES TO THE PROCEEDING

Petitioner Angel Morales is an inmate currently incarcerated under the care, custody and control of Respondent Joseph Smith, the Superintendent of Shawangunk Correctional Facility in New York State.

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Petitioner Angel Morales respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this Case.

## OPINIONS BELOW

The unreported opinion of the United States Court of Appeals for the Second Circuit is appended hereto as Appendix A. The unreported opinion of the United States District Court for the Eastern District of New York is attached as Appendix B.

## STATEMENT OF JURISDICTION

On August 22, 2006, the Second Circuit entered its judgment. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . .; to be confronted with the witnesses against him; [and] to have compulsory process for obtaining witnesses in his favor . . . ." U.S. Const. amend VI. The Fourteenth Amendment to the United States Constitution provides in pertinent part: "No State shall . . . deprive any person of life, liberty, or

property, without due process of law." U.S. Const. amend XIV §1.

## STATEMENT OF THE CASE

### 1. Background

Mr. Morales is currently incarcerated at the Shawangunk Correctional Facility, in the custody of Respondent, Joseph Smith, the prison superintendent. The burglary for which Mr. Morales was convicted occurred in an apartment on Tompkins Avenue, Brooklyn, New York, on April 1, 1999. Mr. Morales is serving a sentence of *16 years to life*.

The only evidence linking Mr. Morales to the crime was a single fingerprint that Officer Michael Curtis testified was collected from a champagne glass inside the apartment. At trial, the prosecution offered neither the champagne glass upon which the fingerprint was allegedly found nor a photograph of it.[1] Importantly, there was no other evidence of guilt (*e.g.*, eye witnesses or stolen goods implicating Mr. Morales in the burglary).

During its case-in-chief, the prosecution offered Rosemarie Simonetti as an expert to testify that the latent print

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[1] *See* Tr. at 112. Citations to "Tr." are to the original record.

from the champagne glass was a match to Mr. Morales.[2] Ms. Simonetti testified that she had been employed in the field of latent fingerprint work for *ten years*, had made "[h]undreds of thousands" of fingerprint comparisons, and had testified "*35 to 40* times as fingerprint expert."[3]

Because the fingerprint evidence was so significant to the prosecution's case and because there was a complete lack of any other evidence of guilt, Mr. Morales's defense was to challenge the prosecution's allegation that *he* left the fingerprint in the apartment. Key to his defense was first establishing, *during the State's case–in-chief*, the fact that fingerprint evidence can be, and has been, moved and otherwise fabricated to implicate suspects.[4] Mr. Morales laid the foundation for the defense by first establishing, through cross-examination of Officer Curtis, that the fingerprint evidence bore indicia of being fabricated because it was not photographed before it was collected and the champagne glass was not preserved as evidence.[5]

Defense counsel then sought to obtain a concession through Ms. Simonetti that fingerprint evidence can be fabricated to help build the defense that the fingerprint was planted. But Ms.

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[2] *Id.* at 119.

[3] *Id.* at 120-21.

[4] *Id.* at 70-71, 160-61, 367-68, 418-21, 423-26.

[5] *Id.* at 112.

Simonetti inaccurately testified that fingerprints could not be moved or fabricated despite having knowledge of a New York State Police scandal in which a number of New York State Police officers had fabricated fingerprint evidence to frame suspects.[6] Before defense counsel could correct or otherwise explore this inaccurate testimony, the trial court unconstitutionally prevented defense counsel from further cross-examining Ms. Simonetti on the subject of fingerprint fabrication.

During the defense case, Mr. Morales sought to call a fingerprint expert to establish: (i) that the errors in the method of collection described by Officer Curtis precluded verification of the source of the fingerprint; (ii) that under similar circumstances to those presented here, fingerprint evidence can be, and indeed has been, fabricated by law enforcement officials; and (iii) reasonable doubt. But the trial court unconstitutionally precluded Mr. Morales from calling his own fingerprint expert.

### a. Restrictions on Cross-Examination of the Prosecution's Expert

During his cross-examination of Ms. Simonetti, defense counsel sought to develop the theory of the defense that Mr. Morales's fingerprint was planted. He began by questioning Ms. Simonetti about fingerprint fabrication:

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[6] *Id.* at 160-61.

Defense Counsel: M[s.] Simonetti, is it true that fingerprints can be moved from one place to another?

Ms. Simonetti: Not to my knowledge.[7]

But because Ms. Simonetti's testimony that fingerprints cannot be moved was incorrect, he hit an unexpected road block. Not to be deterred, however, defense counsel sought to the expert's testimony with the New York State Police fingerprint tampering scandal. Ms. Simonetti testified that she knew about the New York State Police scandal from what she had read in the newspaper so this line of questioning was perfectly appropriate.[8]

Despite the fact that Ms. Simonetti acknowledged that she knew about the fingerprint-tampering scandal, the trial court inexplicably cut off further cross-examination into the subject of fingerprint fabrication. As a result, the jury was left, at the close of the State's case, with the inescapable conclusion that fingerprint evidence *could not* be fabricated and that, therefore, Mr. Morales *must have* left his fingerprint in the apartment. To be sure, however, neither of these conclusions were correct nor supported by any credible evidence.

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[7] *Id.* at 160.

[8] *Id.* at 160-61.

### b. Preclusion of the Defense Fingerprint Expert

Having been restricted in cross-examining Ms. Simonetti, Mr. Morales next sought to counter and correct her inaccurate and prejudicial testimony *and* support his theory of the defense by offering a fingerprint expert of his own:

> Mr. Sartori: Witl. respect to my two motions to liminae that we discussed in chambers, [the defense expert] should be allowed to testify with respect to fingerprint fabrication and the ability for there to be movement with respect to fingerprints from one location to another.
>
> The two witnesses that the People called with respect to the fingerprint evidence [Officer Curtis and Ms. Simonetti] testified to two specific statements that I believe to be inaccurate, if not untrue.
>
> One, that a print could not be messed up or destroyed in the lifting process, and secondly, that fingerprints couldn't be moved from one location to another.
>
> I would ask to have my expert be allowed to be called for those purposes and those purposes only and the People be limited in their questioning to those issues.
>
> The Court: That's denied.[9]

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[9] *Id.* at 367-68.

Even though the theory of the defense necessarily required a concession by Mr. Morales that it was his fingerprint, the trial court based this unconstitutional decision on its decision that the only issue was whether the fingerprint matched Mr. Morales's fingerprint:

> Mr. Sartori: It's our argument that these go to credibility and whether or not these witnesses are as credible as they would have the Court believe, one having been declared an expert. . . .
>
> The Court: I'm going to deny [Mr. Morales's motion to present a fingerprint expert]. I think that the trial should focus on the real issues and there are two real issues here. Is it his fingerprint; yes or no. . . . That's the legitimate issue.[10]

On February 17, 2000, Mr. Morales was convicted in Kings County Supreme Court of burglary in the second degree. On March 15, 2000, he was sentenced to imprisonment for a minimum term of sixteen years to life.

### c. The Habeas Petition

On February 28, 2005, Mr. Morales filed a timely petition under 28 U.S.C. § 2254 for a Writ of Habeas Corpus By a Person in State Custody, in the United States District Court for the Eastern District of New York. On September 27, 2005, the district court denied Mr. Morales's petition in a memorandum opinion. The district court, however, *sua sponte* issued a certificate of

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[10] *Id.* at 369-70.

appealability as to both issues raised in Mr. Morales's petition.[11] The district court entered a final judgment denying the petition on October 3, 2005. Mr. Morales timely filed a Notice of Appeal in the district court on October 17, 2005. The Second Circuit affirmed the district court's opinion on August 22, 2006 finding that (i) Mr. Morales had no constitutional right to cross-examine Ms. Simonetti with hearsay evidence or to cross-examine Ms. Simonetti "with a passage from a text that conflicts with the opinion he or she has expressed unless the expert has first admitted that the text is authoritative," and (ii) a defense expert on fingerprint fabrication would have been speculative without evidence that the fingerprint evidence was *actually* fabricated.

## REASONS FOR GRANTING THE WRIT

This Court has repeatedly affirmed that a criminal defendant's right to present a full and meaningful defense is a basic tenet of constitutional law: "Whether rooted directly in the Due Process Clause of the Fourteenth Amendment . . . or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, . . . the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'"[12] Mr. Morales did not have a meaningful opportunity to present a

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[11] *See* 28 U.S.C. § 2253(c); Fed. R. App. P. 22(b)(1).

[12] *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (citations omitted) (quoting *California v. Trombetta*, 467 U.S. 479, 485 (1984)).

complete defense in this case because the trial court prevented him from: (i) cross-examining the State's expert witness; and (ii) calling his own expert fingerprint witness.

The right of a criminal defendant to cross-examine witnesses against him is, "a primary interest secured by [the Confrontation Clause]."[13] Where the right to cross-examine is unfairly denied, the constitutional error is "of the first magnitude."[14] A defendant's right to call his own witnesses "stands on no lesser footing than the other Sixth Amendment rights [the Court] has previously held applicable to the States."[15] Where a trial court denies this right, the truth-finding process is defeated and the jury is forced to render a verdict on incomplete facts.[16] Indeed, as this Court stated in *Taylor v. Illinois*, "[t]he ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts."[17]

The State's case against Mr. Morales was based exclusively on a single fingerprint that was purportedly located on a glass in the premises. There were no eyewitnesses to the

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[13] *Douglas v. Alabama*, 380 U.S. 415, 418 (1965).

[14] *Smith v. Illinois*, 390 U.S. 129, 131 (1968) (quoting *Brookhart v. Janis*, 384 U.S. 1, 3 (1996)).

[15] *Washington v. Texas*, 388 U.S. 14, 18 (1967).

[16] *See, e.g., Blakely v. Washington*, 542 U.S. 296, 308-309 (2004); *Kentucky v. Stincer*, 482 U.S. 730, 736 (1987).

[17] *Taylor v. Illinois*, 484 U.S. 400, 409, 411 (1988).

burglary, and the stolen goods were never traced to Mr. Morales. The prosecution offered neither the glass upon which the fingerprint was allegedly found nor a photograph of it. Accordingly, Mr. Morales's defense was focused on instilling reasonable doubt as to how *and* whether that fingerprint was allegedly found in the premises.

Where the only issue in dispute is the identity of the perpetrator, and the only evidence offered to adduce the identity is a single fingerprint, the credibility and reliability of that single piece of evidence is paramount. From the outset, Mr. Morales attempted to instill reasonable doubt by attacking the credibility of the only evidence against him—the fingerprint. He began by attempting to establish through the State's fingerprint expert, Ms. Simonetti, the indisputable proposition that fingerprint evidence can be and, in fact, has been fabricated by the police to frame suspects. But Ms. Simonetti testified that, to her knowledge, fingerprints could not be moved.

As a result, defense counsel was forced to cross-examine Ms. Simonetti to correct her obviously incorrect testimony by asking her questions about, among other things, the New York State Police scandal wherein a number of New York State Police officers fabricated fingerprint evidence to frame suspects. [18]

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[18] According to Gerald Arenberg, executive director of the National Association of Chiefs of Police: "'These things happen every single day on the street. . . . And if you don't believe that, you're living in a crystal

*(cont'd)*

Despite the extremely damaging impact of Ms. Simonetti's plainly wrong testimony on the defense and the fact that Ms. Simonetti's acknowledged hearing of the fingerprint-tampering scandal, the trial court inexplicably prevented further cross-examination into this area. As a result, the jury was left with the inescapably wrong conclusion that fingerprint evidence cannot be fabricated.

After this devastating setback, Mr. Morales sought to call an expert of his own to testify regarding fingerprint fabrication in this case. The obvious intent was to not only correct the jury's misunderstanding that fingerprint could not be fabricated, but also to instill reasonable doubt as to the authenticity of the single piece of evidence that the prosecution offered. But the trial court denied this effort as well. By precluding Mr. Morales from effectively challenging that single fingerprint, the trial court left the jury with no choice but to find Mr. Morales guilty.

Mr. Morales's conviction was therefore obtained in violation of the Constitution of the United States because he was prevented from presenting a defense, from adequately confronting

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palace.'" Mark Hansen, *Troopers' Wrongdoing Taints Cases*, 80 A.B.A. J. 22, 22 (1994). *See also* Simon A. Cole, *Fingerprinting: The First Junk Science?*, 28 Okla. City U.L. Rev. 73, 77-78 & n.21 (2003) (citing Nelson E. Roth, *The New York State Police Evidence Tampering Investigation* (1997), as evidence that "fingerprint evidence is not immune to either error or fraud"); Tara Marie La Morte, Comment, *Sleeping Gatekeepers:* United States v. Llera Plaza *and the Unreliability of Forensic Fingerprinting Evidence Under* Daubert, 14 Alb. L.J. Sci. & Tech. 171, 187-88 (2003) (discussing documented fingerprint fabrication by police officers in New York and other states).

the prosecution's expert witness and from calling his own expert witness. These errors by the trial court involved the *only* piece of evidence connecting Mr. Morales to the burglary—a single fingerprint. These errors were not harmless.

### 1. The Trial Court Unconstitutionally Deprived Mr. Morales of a Fair Trial and a Meaningful Opportunity to Present a Complete Defense

#### a. The Trial Court Unconstitutionally Denied Mr. Morales the Right to Meaningfully Cross-Examine the Prosecution's Fingerprint Expert

Mr. Morales's Sixth Amendment right to cross-examine witnesses testifying against him is one of the most deeply-rooted principles under Supreme Court law.[19] The Confrontation Clause protects questioning of a prosecution witness's accuracy, general credibility and, in the case of an expert, knowledge and expertise.[20] When Ms. Simonetti testified that she believed that fingerprints could not be moved, defense counsel had to pursue additional questioning to correct that inaccuracy and if he could not, to demonstrate that she was not a credible witness, that she

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[19] *Douglas v. Alabama*, 380 U.S. 415, 418 (1965). This Sixth Amendment right applies to the states through the Fourteenth Amendment. *See Pointer v. Texas*, 380 U.S. 400, 406 (1965); *Davis v. Alaska*, 415 U.S. 308, 318 (1974).

[20] *See Delaware v. Fensterer*, 474 U.S. 15, 20-21 (1985).

did not possess the requisite knowledge or expertise and that her testimony was wrong. But the trial court's preclusion of further cross-examination prevented Mr. Morales from doing that.[21]

This Court's decisions in *Davis v. Alaska* and *Smith v. Illinois*[22] are especially relevant here. In *Davis v. Alaska*, this Court held that a defendant's right to cross-examination is effectively denied when a defendant is prohibited from "expos[ing] to the jury the facts from which jurors, as the sole

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[21] The Second Circuit's finding that Mr. Morales's constitutional rights were not denied because he could not impeach Ms. Simonetti with hearsay evidence was erroneous and was not the basis upon which the trial court precluded the questioning. Indeed, hearsay is an out of court, unsworn statement offered in evidence to prove the truth of the matter asserted. *See, e.g.*, Fed. R. Evid. 801(c) (upon which New York's hearsay rule is modeled). First, defense counsel did not seek to offer into evidence an out of court, unsworn statement to confront Ms. Simonetti. Second, the questioning surrounding fingerprint fabrication also could not have qualified as hearsay because it was offered to probe Ms. Simonetti's state of mind and not for the truth of the matter asserted. To the extent that the Second Circuit found that the trial court was correct in precluding cross-examination "with a passage from a text that conflicts with the opinion [that the expert] has expressed unless the expert has first admitted that the text is authoritative," the Second Circuit's opinion finds no support in the trial court record. Indeed, the trial transcript reveals that defense counsel never sought to cross-examine Ms. Simonetti with a passage from any text. Rather, defense counsel simply asked Ms. Simonetti if she knew about the New York State Police fingerprint scandal to which she responded affirmatively because she had read about it in the newspaper. Tr. at 160-161.

[22] *Smith v. Illinois*, 390 U.S. 129 (1968).

triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness."[23]

In *Davis v. Alaska*, the petitioner was convicted of burglary and grand larceny for allegedly stealing a safe from a bar. This Court determined that the trial court violated the petitioner's Sixth Amendment Confrontation Clause right by refusing to allow the petitioner to question a key prosecution witness about the witness's probationary status. This Court reasoned that the inability of the defense to question the witness about his probationary status deprived the jury of information it could use to weigh the witness's credibility. Even though *Davis v. Alaska* primarily dealt with witness bias, this Court restated the broader rule that impeachment is also fair game: "the cross examiner is not only permitted to delve into the witness' story to test the witnesses' perceptions and memory, but the cross-examiner has traditionally been allowed to impeach, *i.e.*, discredit the witness."[24]

Similarly, in *Smith v. Illinois*, the trial court refused to allow the defense to question a witness about his real name and where he lived. On appeal, the petitioner argued that the trial Court denied his Sixth Amendment Confrontation rights. This Court found that *although these questions seemed preliminary*, they also served a *deeper* purpose. The defense was attempting to

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[23] *Davis v. Alaska*, 415 U.S. at 318.

[24] *Id.* at 316.

help the jury understand the witness' perspective and background, an area "to which cross-examination *may always* be directed."[25] This Court further found that "[t]o say that prejudice can be established only by showing that the cross-examination, if pursued, would necessarily have brought out facts tending to discredit the testimony in chief, is to deny a substantial right and withdraw one of the safeguards essential to a fair trial."[26] In *Smith v. Illinois*, the cross examination was not limited to a specific area of inquiry as in *Davis*, yet the trial court still violated the defendant's right by not allowing an effective cross examination.

Under *Davis v. Alaska* and *Smith v. Illinois*, Mr. Morales should have been allowed to cross-examine Ms. Simonetti to "delve into [her] perceptions and memory" and to "impeach, *i.e.*, discredit [her]."[27] Because there was so little evidence of guilt and because Ms. Simonetti's mistaken testimony was so intimately related to that evidence and Mr. Morales's theory of defense, there was no reason to bar the cross-examination.

**b. The Trial Court Unconstitutionally Denied Mr. Morales the Right to Call an Expert Witness on His Behalf**

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[25] *Smith v. Illinois,* 390 U.S. at 132 (emphasis added).

[26] *Id.* at 132.

[27] *Davis v. Alaska*, 415 U.S. at 316.

Mr. Morales was also denied the paramount constitutional right to call witnesses to meaningfully present his defense.[28] This Court has unequivocally held that "[f]ew rights are more fundamental than that of an accused to present witnesses in his own defense."[29] Moreover, as this Court explained in *Washington v. Texas*, "[t]he right to offer the testimony of witnesses . . . is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies."[30] Where, as here, the evidentiary support for the conviction is very weak, the wrongfully excluded evidence need only be of "relatively minor importance" to support habeas relief. Indeed, as this Court stated in *United States v. Agurs*, "if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt."[31]

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[28] "The right to compel a witness' presence in the courtroom could not protect the integrity of the adversary process if it did not embrace the right to have the witness' testimony heard by the trier of fact. The right to offer testimony is thus grounded in the Sixth Amendment." *Taylor v. Illinois*, 484 U.S. 400, 409 (1988); *see also Washington v. Texas*, 388 U.S. 14, 18-19 (1967); *Crane*, 476 U.S. at 690-91.

[29] *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973). A state court cannot apply state evidentiary rules in such a way as to violate this right. *See id.* (state evidentiary rules cannot be inflexibly applied in such a way as to violate fundamental fairness).

[30] *Washington v. Texas*, 388 U.S. at 19.

[31] *United States v Agurs*, 427 U.S. 97, 113 (1976).

Mr. Morales's expert's testimony directly related to a disputed factual issue at trial—the validity of the sole piece of evidence—and would have been both material and favorable to his defense because the jury could have concluded that this fingerprint was fabricated. Indeed, the fingerprint expert would have been able to opine as to whether, in his opinion, the fingerprint evidence had been fabricated or that the situation bore sufficient indicia to suggest fabrication (*e.g.*, no eye witnesses, no glass and no photograph of the print). Mr. Morales's expert was, therefore, *critically important* to refuting the prosecution's case and establishing reasonable doubt.

The trial court excluded Mr. Morales's expert witness based upon the erroneous conclusion that such testimony would be irrelevant. The trial court ruled that the defense could not call an expert to establish the possibility that prints could be planted, without *first* showing that the print *had been* moved. Without such a factual showing, the trial court reasoned, the expert testimony would be speculative.[32] *But if the defense had been able*

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[32] The Second Circuit's assertion that the trial court did not violate Mr. Morales's constitutional rights because Mr. Morales did not lay sufficient foundation to show that the fingerprint was fabricated is misplaced. The law simply cannot be that a criminal defendant must *first* have the police officer who collected the evidence admit on the stand that he illegally fabricated the fingerprint *before* the defendant is permitted to call an expert to explain to the jury the likelihood of such fabrication. Such a standard not only would be impermissibly high and would eviscerate the defendant's Sixth and Fourteenth Amendment rights, but it would be

*(cont'd)*

*to show, as a matter of fact, that the print had been fabricated, there would have been no reason to call an expert to explain that possibility to the jury.*

Here, as in *Agurs,* where the trial courts' ruling prohibited Mr. Morales from presenting his expert's testimony to the jury, the error was unconstitutional because the expert would have "create[d] a reasonable doubt that did not otherwise exist" as to the authenticity and validity of the fingerprint evidence.[33] Without Mr. Morales's expert's testimony, which would have controverted the State's case, Mr. Morales had no opportunity to present his theory of the defense that his fingerprint was planted. Accordingly, the trial court's denial of Mr. Morales's request to call a fingerprint expert deprived Mr. Morales of his Sixth and Fourteenth Amendment rights to a fair trial, to present a defense and to compel witnesses on his behalf.

**2. Standard of Review**

The Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA") governs the disposition of this Petition.[34] Under the AEDPA, habeas relief may not issue unless the state court has

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unnecessarily duplicative because the officer's admission would be a game ender for the prosecution's case.

[33] *Agurs*, 427 U.S. at 112.

[34] *See* Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, §§ 101-06, 110 Stat. 1214, 1217-21; *Penry v. Johnson*, 532 U.S. 782, 792 (2001); *Williams v. Taylor*, 529 U.S. 362, 412 (2000).

rendered a decision that was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."[35]

The threshold question is whether the rule sought to be applied by the habeas petitioner was clearly established by holdings of Supreme Court cases. Under this Court's analysis in *Williams v. Taylor*, the question whether a particular rule is "clearly established" by Supreme Court precedent depends upon whether the Court has previously announced a general rule governing the constitutional claim of the sort advanced by the habeas petitioner. The analysis is not dependent upon whether this Court has expressly decided a case involving the exact fact-pattern as in the habeas petitioner's case. Here, Mr. Morales seeks to apply the general, well-settled rules of, for example, *Pointer v. Texas*, *Smith v. Illinois*, *Chambers v. Mississippi*, *Davis v. Alaska* and *Crane v. Kentucky* that a criminal defendant is entitled to a fair trial, to a meaningful opportunity to present a complete defense, to cross-examine witnesses and to compel witnesses on his own behalf.[36]

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[35] 28 U.S.C. § 2254(d)(1).

[36] *See, e.g.*, *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) ("[T]he Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'") (citation omitted); *see also Chambers v. Mississippi*, 410 U.S. 284, 302 (1973) ("Few rights are more fundamental than that of an accused to present witnesses in his own defense."); *Pointer v. Texas*, 380 U.S. 400, 404 (1965) (noting that the Supreme

*(cont'd)*

Although harmless error review is the standard in federal habeas corpus proceedings, this Court has established that where a constitutional right is involved, relief is required unless the error is harmless *beyond a reasonable doubt.*[37] This Court has also confirmed that where there is uncertainty about whether or not a trial court's error was harmless, "the uncertain judge should treat the error, not as if it were harmless, but as if it affected the verdict (*i.e.*, as if it had a 'substantial and injurious effect or influence in determining the jury's verdict')."[38]

### a. The Trial Court's Violation of Mr. Morales's Confrontation Clause Rights Were Not Harmless

Federal courts look to five factors to determine whether a violation of the Confrontation Clause was harmless:

> (1) how important the witness' testimony was to the prosecution's case, (2) whether the testimony was cumulative, (3) whether other evidence in the record corroborated or contradicted the witness on relevant matters, (4) whether other cross-examination of the witness was permitted and the

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*(cont'd from previous page)*
Court has "constantly emphasized the necessity for cross-examination as a protection for defendants in criminal cases").

[37] *See Mitchell v. Esparza*, 540 U.S. 12, 17-18 (2003) ("A constitutional error is harmless when 'it appears "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained."'") (citations omitted); *accord Chapman v. California*, 386 U.S. 18, 24 (1967).

[38] *O'Neal v. McAninch*, 513 U.S. 432, 435 (1995).

> extent of it, and (5) what effect the testimony would have on proof of defendant's guilt.[39]

Importantly, under *Van Arsdall*, the reviewing court must assume that the cross-examination would have had its maximum effect.[40] In this case, each of the *Van Arsdall* factors weighs heavily in Mr. Morales's favor.

Of the *Van Arsdall* factors, the first (the importance of the testimony) and the fifth (the effect the witness's testimony had on proving the defendant's guilt) are the most important and overwhelmingly favor Mr. Morales. Regarding the first prong, that Ms. Simonetti's testimony was essential to the prosecution's case cannot be disputed. She was a designated expert and the only witness offered by the prosecution to identify the fingerprint as Mr. Morales's. Without her testimony, the prosecution would not have been able to place Mr. Morales in the apartment. Moreover, by refusing to permit further cross-examination of Ms. Simonetti on the issue of fingerprint fabrication, the trial court undermined Mr. Morales's defense and the credibility of defense counsel. Ms. Simonetti's erroneous testimony that fingerprints could not be moved completely eviscerated defense counsel's theory that the fingerprint evidence may have been fabricated.[41] Thus, the first

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[39] *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986).

[40] *Id.*

[41] Tr. at 160-61.

prong under *Van Arsdall* indicates that the constitutional error was not harmless.

With respect to the fifth factor, the prosecution's case hinged on Ms. Simonetti's matching of the fingerprint identified as having been found at the scene of the burglary to Mr. Morales. If the jury had reasonable doubt as to whether Mr. Morales left the fingerprint at the scene of the crime, then no evidence linked Mr. Morales to the burglary. Ms. Simonetti's testimony and credibility were thus critical to proving guilt. If Mr. Morales had been allowed to impeach Ms. Simonetti's credentials by establishing her unfamiliarity with fingerprint evidence fabrication and her inability to assess whether fingerprint evidence had been fabricated (much less her understanding that it could have been), her testimony and the prosecution's single piece of physical evidence would have been questioned by the jury. But because the trial court barred further cross-examination, the jury had no alternative but to believe Ms. Simonetti's testimony and conclude that the fingerprint that she identified must have been left at the scene by Mr. Morales.

As to the second prong (whether the witness's testimony was cumulative), Ms. Simonetti's testimony was not, nor could it have been, cumulative because she was the only witness who testified about the identity of the fingerprint. Nor was confronting her inaccurate testimony cumulative. Rather, it was necessary to either correct the inaccurate assertions that she made or impeach

her credibility. Accordingly, this prong overwhelmingly favors Mr. Morales.

The third prong (whether other evidence in the record corroborated or contradicted the witness on relevant matters) also supports Mr. Morales because there was *no other evidence* on the record to corroborate Ms. Simonetti's testimony. Cross-examination was the first opportunity for the defense to offer evidence that both contradicted her testimony on the highly relevant issue of whether this fingerprint could have been fabricated and raised concern about her credibility. Significantly, the trial court also precluded Mr. Morales from introducing his own fingerprint expert to contradict Ms. Simonetti's testimony, compounding the damage done by denying his right to fully cross-examine her.

The fourth prong under *Van Arsdall* (the extent to which cross-examination about other issues was permitted) also favors Mr. Morales. Mr. Morales was not allowed to cross-examine *at all* about the possibility that the fingerprint could have been fabricated. Cross-examination in other areas was no substitute for cross-examination in this central area to the defense.

In sum, all of the *Van Arsdall* factors compel a finding that the trial court's Confrontation Clause violation was not harmless error. Moreover, because the incorrect testimony and the resultant constitutional error in limiting cross-examination related to the only piece of evidence linking Mr. Morales to the crime, there can be no doubt that the constitutional error adversely

affected the jury verdict. A reasonable doubt about whether Mr. Morales left the fingerprint at the scene of the burglary would *a fortiori* translate into a reasonable doubt as to whether Mr. Morales committed the burglary. Here, as in *Davis v. Alaska* and *Smith v. Illinois*, because the trial court prevented Mr. Morales from effectively cross-examining Ms. Simonetti, Mr. Morales was prevented from mounting *any* challenge to the fingerprint evidence whatsoever.

**b. The Trial Court's Violation of Mr. Morales's Rights to a Fair Trial, to Present a Meaningful Defense and to Call Witnesses Were Not Harmless**

Once the trial court precluded cross-examination of Ms. Simonetti, Mr. Morales's excluded expert testimony was relevant to the *only* critical issue in the case: whether Mr. Morales *had to have* left the fingerprint in the apartment *or* whether the evidence *could have been* fabricated. Indeed, once Ms. Simonetti incorrectly testified that fingerprints could not be moved and the trial court unconstitutionally precluded further cross-examination, Mr. Morales should absolutely have been permitted to call an expert of his own to rebut the incorrect conclusion that her

testimony left in the jury's mind, to show why this fingerprint might have been fabricated and to install reasonable doubt.[42]

Expert witness testimony on fingerprint evidence fabrication would also have supported the defense's theory and could have been adopted as fact by the jury.[43] To be sure, Mr. Morales did not have to prove that his fingerprint was *actually* planted or fabricated; he needed only to instill reasonable doubt in the prosecution's assertion that he left it at the scene. The prosecution offered only a image of the fingerprint, Officer Curtis's testimony that he collected it (but did not photograph it or save the glass), and Ms. Simonetti's testimony that it matched Mr. Morales's fingerprint. Mr. Morales's expert's testimony (*e.g.*, that the evidence could have been fabricated) would necessarily have "create[d] a reasonable doubt that did not otherwise exist" about the credibility and sufficiency of the prosecution's evidence and of Ms. Simonetti's testimony.[44]

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[42] Because fingerprint identification and fabrication are subjects beyond a juror's lay knowledge, a defense expert was essential to establish the theory of the defense. *See, e.g.*, *People v. Myers*, 220 A.D.2d 272, 273, 632 N.Y.S.2d 111, 112 (1st Dep't 1995).

[43] *See United States v. Wade*, 388 U.S. 218, 227-28 (1967) (discussing "the accused . . . opportunity for a meaningful confrontation of the Government's case at trial through the ordinary processes of cross-examination of the Government's expert witnesses and the presentation of the evidence of his own experts" as related to fingerprint identification for example) (decided on other grounds).

[44] *Agurs*, 427 U.S. at 112.

Furthermore, it is widely accepted that both the prosecution and the defense must be allowed to cross-examine and impeach each other's expert witnesses, as well as to put forth their own expert with a different conclusion.[45] Indeed, in *Taylor v. Illinois*, this Court stated:

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.[46]

This Court has also repeated in *Smith v. Illinois* that "'a denial of cross-examination without waiver . . . would be constitutional error of the first magnitude and no amount of

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[45] *See. e.g.*, *People v. Cronin*, 60 N.Y.2d 430, 432, 458 N.E.2d 351, 352, 470 N.Y.S.2d 110, 111 (1983); *see People v. Gilliam*, 45 A.D.2d 744, 745, 356 N.Y.S.2d 663, 664 (2d Dep't 1974) (Hopkins, J., dissenting) (noting that a defendant's right to produce witnesses in support of defense is fundamental), *rev'd mem.*, 37 N.Y.2d 722, 337 N.E.2d 129, 374 N.Y.S.2d 616 (1975); *see also People v. Gilliam*, 37 N.Y.2d 722, 723, 337 N.E.2d 129, 129, 374 N.Y.S.2d 616, 616 (1975) (mem. *per curiam*) (reversing and ordering a new trial "on the dissenting opinion by Mr. Justice James D. Hopkins").

[46] *Taylor v. Illinois*, 484 U.S. 400, 409 (1988) (quoting *Washington v. Texas*, 388 U.S. 14, 19 (1967)).

showing of want of prejudice would cure it.'"[47] And in *Davis v. Alaska,* this Court sated: "Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested. Subject always to the broad discretion of a trial judge to preclude repetitive and unduly harassing interrogation, the cross-examiner is not only permitted to delve into this witnesses' . . . perceptions and memory, but the cross-examiner has traditionally been allowed to impeach, *i.e.*, discredit, the witness."[48]

The trial court's preclusion of a defense expert in this case prevented the jury from effectively weighing the evidence because the jury was unaware of all of the relevant testimony. Because the single fingerprint was the only evidence linking Mr. Morales to the crime, the jury could not have convicted Mr. Morales without a finding of reliability.

In light of the minimal evidence used to convict Mr. Morales, the precluded expert testimony is far greater than the evidence of "relatively minor importance" required by this Court as a predicate for habeas relief in a case where the verdict is premised upon weak evidence.[49] Under the circumstances presented here, any evidence calling into question the authenticity

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[47] *Smith v. Illinois,* 390 U.S. 129, 131 (1968) (quoting *Brookhart v. Janis,* 384 U.S. 1, 3 (1966)).

[48] *Davis v. Alaska,* 415 U.S. 308, 316 (1974).

[49] *Agurs*, 427 U.S. at 113.

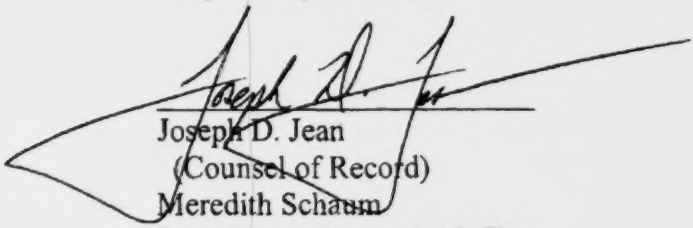
of the fingerprint evidence and its purported discovery, especially in the form of expert testimony showing that the fingerprint evidence could have been fabricated, would have created reasonable doubt in this case. The trial court's exclusion of Mr. Morales's expert was, therefore, not a harmless error.

## CONCLUSION

Certiorari is warranted because, by excluding cross-examination of Ms. Simonetti and the defense expert, the trial court and the Appellate Division (in affirming) unreasonably applied Supreme Court precedent protecting the constitutional right to a fair trial, to call and confront witnesses and to present a defense. The petition for a writ of certiorari should therefore be granted.

Dated: New York, New York
November 20, 2006

Respectfully submitted,



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*Attorneys for Petitioner-Appellant Angel Morales*

# APPENDIX

**APPENDIX A — SUMMARY ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT FILED AUGUST 22, 2006**

**UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT**

PRESENT:

HON. CHESTER J. STRAUB,
HON. ROSEMARY S. POOLER,
HON. ROBERT D. SACK,

*Circuit Judges.*

No. 05-6059-pr

ANGEL MORALES,

*Petitioner-Appellant,*

v.

JOSEPH SMITH,

*Respondent-Appellee.*

**SUMMARY ORDER**

Appeal from a final decision of the United States District Court for the Eastern District of New York (Charles P. Sifton, *Judge*).

AFTER ARGUMENT AND UPON DUE CONSIDERATION, IT IS ORDERED, ADJUDGED, AND DECREED that the judgment of the District Court is hereby **AFFIRMED**.

*Appendix A*

Petitioner-Appellant Angel Morales appeals from a judgment entered on October 3, 2005, in the United States District Court for the Eastern District of New York (Charles P. Sifton, *Judge*), denying his petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Morales seeks to vacate his convictions for burglary in the second degree, N.Y. Penal L. § 140.25(2), and related crimes. Although the District Court denied Morales's petition in its entirety, it granted a certificate of appealability on the issues of whether "the exclusion of Morales' expert witness and the limitations placed on his cross-examination of Simonetti [, the prosecution's expert witness,] were unreasonable applications of federal law." *Morales v. Smith*, CV-05-1104, 2005 WL 2367621, at *8 (E.D.N.Y. Sept. 27, 2005). We assume the parties' familiarity with the facts, the procedural history, and the specification of issues on appeal.

Under 28 U.S.C. § 2254(d), as modified by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214, 1216, we may only grant relief to Morales if the decision of the state court[1] "resulted in a decision that . . . involved an unreasonable application of [] clearly established Federal law, as determined by the Supreme Court of the United States . . . [or] that was based on an unreasonable determination of

1. The Appellate Division of the Supreme Court of New York affirmed Morales's convictions, *People v. Morales*, 308 A.D.2d 229 (2d Dep't. 2003), and the New York Court of Appeals declined to hear his case, 1 N.Y.3d 576 (2003).

the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d).[2]

"The right of cross-examination is included in the right of an accused in a criminal case to confront the witnesses against him." *Howard v. Walker,* 406 F.3d 114, 128 (2d Cir. 2005) (internal quotation marks omitted and alterations incorporated). The right to cross-examine is not absolute, but is subject to the "wide latitude" the Sixth Amendment affords trial judges, allowing them "to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." *Id.* at 129 (internal quotations marks omitted) (quoting *Delaware v. Van Arsdall,* 475 U.S. 673, 679 (1986)), The right to cross-examine "is effectively denied when a defendant is prohibited from 'expos[ing] to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness.'" *Id.* (alteration in original) (quoting *Davis v. Alaska,* 415 U.S. 308, 318 (1974)).

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2. The "contrary to" clause of 28 U.S.C. § 2254(d) is not relevant to this case because the Appellate Division did not "arrive[] at a conclusion opposite to that reached by this Court on a question of law or . . . decide[] a case differently than this Court has on a set of materially indistinguishable facts." *Williams v. Taylor*, 529 U.S. 362, 413 (2000). Where — as in this case — "a state court fails to articulate the rationale underlying its rejection of a petitioner's claim, and when that rejection is on the merits, the federal court will focus its review on whether the state court's ultimate decision was an 'unreasonable application' of clearly established Supreme Court precedent." *Sellan v. Kuhlman*, 261 F.3d 303, 311-12 (2d Cir. 2001).

*Appendix A*

We find no merit in Morales's claim that the trial courtviolated his right to cross-examine Simonetti. The trial court's limitation was entirely reasonable given that the proposed line of questioning concerned hearsay information contained in the "Roth Report."[3] *See United States v. Delano*, 55 F.3d 720, 732 (2d Cir. 1945) (holding that exclusion of hearsay statements that contradicted witnesses' testimony did not violate defendant's rights under the confrontation clause); *accord People v. Laracuente*, 21 A.D.3d 1389, 1391 (4th Dep't 2005) (holding that limiting questioning concerning hearsay information in a report that was not admitted in evidence was proper under New York law).

Furthermore, the proposed line of cross-examination was not a proper method for impeaching Simonetti's reliability. There was nothing unreasonable in the trial court's application of the black-letter law principle that an expert witness may not be confronted with a passage from a text that conflicts with the opinion he or she has-expressed unless the expert has first admitted that the text is authoritative. *See People v. Feldman*, 299 N.Y. 153, 168 (1949); *Laracuente*, 21 A.D.3d at 1391 (holding that the trial court properly limited the cross-examination regarding a text that was not established to be authoritative); *accord* Fed. R. Evid. 803(18) (requiring either an admission or judicial notice that the text is an authority). Morales failed to obtain such an admission from Simonetti concerning the Roth Report.

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3. The "Roth Report," is a 1997 report prepared by special prosecutor Nelson E. Roth, detailing the results of an investigation into practices of tampering with evidence, including fingerprint evidence, by some New York State police officers.

We also think that Morales has failed to establish that he is entitled to relief on the basis of the trial court's exclusion of his expert witness. "The [D]ue [P]rocess [C]lause of the Fifth Amendment and the compulsory process clause of the Sixth Amendment guarantee each criminal defendant the right to present a defense." *United States v. Stewart,* 433 F.3d 273, 310-11 (2d Cir. 2006) (quoting *United States v. Almonte,* 956 F.2d 27, 30 (2d Cir. 1992) (per curiam) (internal quotation marks omitted)). To establish a Sixth Amendment violation, a defendant must demonstrate that he was deprived of the opportunity to present a witness who would have provided testimony that was both material and favorable to his defense. *Howard,* 406 F.3d at 132 (2d Cir. 2005).

At trial, Morales sought to introduce expert testimony to the effect that fingerprints can "be moved from one location to another." The trial court excluded the testimony as "irrelevant" because, in the court's view, the only "legitimate issue" was whether the fingerprint found in the burglary victim's apartment was Morales's. Whether or not the trial court properly excluded Morales's evidence, we do not think that any such error would render Morales eligible for habeas relief. A state court's evidentiary errors are subject to harmless error review. *See id.* at 122. We think that, in light of the absence of any evidence to indicate that the fingerprint in issue had been planted at the crime scene or otherwise tampered with, Morales's proffered expert testimony, even if admissible, was highly speculative. The trial court's decision to exclude it could not have had a "substantial and injurious effect or influence" on the jury's verdict, *Brecht v. Abrahamson,* 507 U.S. 619, 637 (1993) (internal quotation marks and citations omitted), and could be reasonably thought

"harmless beyond a reasonable doubt," *Chapman v. California,* 386 U.S. 18, 24 (1967); *see Benn v. Greiner,* 402 F.3d 100, 105 (2d Cir. 2005) (stating that it is an "open question" whether we apply *Brecht* or *Chapman* to determine harmless error under AEDPA).

For the foregoing reasons, the judgment of the District Court is hereby AFFIRMED.

FOR THE COURT:

ROSEANN B. MACKECHNIE, CLERK

BY: s/ Lucille Carr

## APPENDIX B — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK DATED SEPTEMBER 29, 2005

**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF NEW YORK**

CV-05-1104 (CPS)

Angel Morales,

Petitioner,

- against -

Joseph Smith,

Respondent.

**MEMORANDUM OPINION AND ORDER**

SIFTON, Senior J.

On February 28, 2005, Angel Morales filed this petition for habeas corpus pursuant to 28 U.S.C. § 2254 seeking review of his conviction in New York Supreme Court for second degree burglary. He is currently serving a sentence of sixteen years to life imprisonment. Morales states the following two claims for relief from his conviction: (1) he was denied the right to present a meaningful defense in violation of the Due Process Clause of the Fourteenth Amendment because the trial judge excluded testimony of his expert fingerprint witness; and (2) he was denied the right to confront witnesses against him in violation of the Confrontation Clause of the Sixth Amendment and the Due

*Appendix B*

Process Clause of the Fourteenth Amendment because the trial judge unduly limited the scope of his cross-examination of the state's expert witness.

For the reasons that follow, the petition is denied.

*Background*

The following facts are drawn from the record of the state court proceedings. They are undisputed except where noted.

Morales was arrested on May 1, 1999, after the police received a report that a man was breaking into an apartment on Vernon Avenue in Brooklyn. Shortly after his arrest, Morales was taken to Brooklyn Jewish Hospital. On May 5, 1999, he attempted to escape from the hospital, but was apprehended again. Morales was subsequently charged with the Vernon Avenue burglary.

The police were in the same period of time investigating a burglary that had occurred on Tompkins Avenue in Brooklyn on April 1, 1999. Based on a computer assisted search of the state's fingerprint records, it was determined that a fingerprint recovered from the Tompkins Avenue burglary matched Morales' prints. He was thereafter charged with the Tompkins Avenue burglary.

At trial, the state called Officer Michael Curtis, who recovered the fingerprint from the Tompkins Avenue

apartment. Curtis testified that he lifted the print from a champagne glass in the apartment. An occupant of the apartment testified that she saw the police dust the champagne glass and that she used the glass to store coins.[1] (Tr. 76, 82.) On cross-examination, Curtis testified that he did not take a picture of the glass prior to lifting the print. (Tr. 112.) The occupant of the apartment testified that she washed the glass after the police left. (Tr. 83.)

The state called a fingerprint expert, Rosemarie Simonetti, to testify that the print lifted from the glass matched Morales'. (Tr. 140.) Simonetti testified that she had received the print from Officer Curtis. She testified that she placed the print into a computer fingerprint-matching program. (Tr. 130.) The computer provided a number of possible matches, including Morales' prints. (Tr. 134-35.) She then visually compared the Tompkins Avenue print to Morales' fingerprints and determined that they matched. (Tr. 135-36.) During this testimony, the jury was shown projected pictures of the fingerprint found at the Tompkins Avenue apartment and Morales' fingerprint. (Tr. 144.) After describing the similarities the two prints had, Simonetti testified that she was "a hundred percent" certain that the prints were identical. (Tr. 147.)

On cross-examination, Simonetti testified that, although she had been trained in fingerprint comparison, she had only a vague understanding of how fingerprints are lifted.

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1. The coins had been removed from the glass, but not taken in the burglary, perhaps because they were Canadian. (Tr. 93.)

(Tr. 152.) During this cross-examination, Morales sought to elicit testimony that fingerprints can be "planted."[2] In that connection, Morales sought to cross-examine Simonetti

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2. On cross-examination by Morales' lawyer, the following exchange took place:

Q: [I]s it true that fingerprints can be moved from one place to another?"

A: Not to my knowledge.

Q: Are you familiar with the Roth Report?

A: No.

KOHLER [ADA]: Objection.

SARTORI [Morales' lawyer]: Judge, she is declared an expert.

THE COURT: She said she's not familiar with it.

Q: Are you familiar with newspaper . . .

A: Yes.

KOHLER: Objection.

THE COURT: Sustained.

Q: Are you familiar with New York State troopers —

KOHLER: Objection.

Q: . . . being arrested and indicted for removing fingerprints?

A: Only from reading it in the paper.

THE COURT: Sustained. Sustained.

A: I'm sorry.

(Tr. 160-61.)

concerning a document referred to by counsel as "the Roth Report."[3]

On the defense case, Morales sought leave to call a fingerprint expert witness to testify (1) that fingerprints could

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3. The Roth Report, prepared by special prosecutor Nelson E. Roth, details the results of an investigation into a specific New York State Police troop's practices of tampering with evidence, including planting of fingerprints.

According to the Roth Report, New York State Police Troop C used a variety of methods of fabricating evidence, including:

> (1) simply lying about the source of a legitimate latent print, claiming it came from one location generally incriminating to the suspect rather than its actual source; (2) using the same method as (1), but having the defendant touch an object while in plice custody so that his prints could be obtained to frame him; (3) lifting an nk impression from an inked fingerprint card, perhaps doctoring its appearance, and claiming that it was a latent lift taken from a crime scene; (4) making copies of ink impressions, using a variety of methods, and making lifts from the copies; (5) manipulating photograpic negatives to produce photographs of latents and/or ink impresssions and also depicting a background different than the actual source of the "print"; and (6) making "lifts" directly from the fingers of a dead homicide victim and doctoring their appearnc so as to be able to use them at a later time to "plant" as evidence against a subject . . .

Roth Report 5-6

Morales does not contend that any of the police officers or units discussed in the Roth Report were involved in the investigation of his case.

in fact be moved from one place to another and (2) that a fingerprint can be smudged during the process of lifting it. (Tr. 367-68.) The trial judge denied the application during the following colloquy:

> SARTORI: With respect to my two motions in limine that we discussed in chambers, first with respect to calling my expert witness, Judge, my initial application is that he should be allowed to testify with respect to fingerprint fabrication and the ability for there to be movement with respect to fingerprints from one location to another.
>
> The two witnesses that the People called with respect to fingerprint evidence testified to two specific statements that I believe to be inaccurate, if not untrue. One, that a print could not be messed up or destroyed in the lifting process, and secondly, that fingerprints couldn't be moved from one location to another. I would ask to have my expert be allowed to be called for those purposes and those purposes only and the People be limited in their questioning to those issues.
>
> THE COURT: That's denied. I don't think there is any reasonable view of the evidence that fingerprint was moved. You can ask the witness, does the fingerprint match the defendant's fingerprint. The two experts can

disagree on that point, but the movement from point A to point B seems irrelevant in the context of this case. Therefore, I'm not going to permit that.

Then you had another point about the tape.

SARTORI: Note my exception. Yes.

COURT: Your argument was you should be permitted to ask the witness, isn't it true that the tape will smudge a fingerprint. That, again, seems an irrelevant issue. The question is, does the fingerprint match the defendant. Was it smudged or unsmudged. Your expert can say this is the wrong fingerprint. It doesn't match.

SARTORI: It's our argument that these go to credibility and whether or not these witnesses are as credible as they would have the Court believe, one having been declared an expert. I believe that the fact that those answers are not accurate goes to their credibility and would have to shed some light on the rest of their testimony as well.

THE COURT: I'm going to deny that. I think that the trial should focus on the real issues and there are two real issues here. Is it his fingerprint; yes or no. Was he trying to break

in to steal or just trying to go in for some other purpose. That's the legitimate issue

(Tr. 368-69.)

Morales thereafter took the stand in his own defense. Morales testified that when he was first arrested, he was suffering from heroin withdrawal. The police took him to the hospital to be treated. He testified that during his hospital stay, he was under police guard, but attempted to escape. The only questioning concerning his presence in the Tompkins Avenue apartment where the fingerprint was found is the following exchange on cross-examination:

Q: Do you know Maqeda Sanderson?

A: No.

Q: Have you ever seen her before she testified?

A: Who is that? The lady that was here?

Q: The woman who testified.

A: There's been a lot of people up here.

Q: The apartment you broke into at 179 Tompkins.

A: No, I didn't rob her apartment.

SARTORI: Objection.

THE COURT: Sustained.

(Tr. 397.)

*Appendix B*

Morales was convicted of burglary in the second degree in violation of New York Penal Law § 140.25(2), criminal trespass in the second and third degrees in violation of New York Penal Law §§ 140.15 & 140.10(a), trespass in violation of New York Penal Law § 140.05, petit larceny in violation of New York Penal Law § 155.25, criminal mischief in the fourth degree in violation of New York Penal Law § 145.00(1), and escape in the second degree in violation of New York Penal Law § 205.10. He was sentenced as a persistent felony offender to sixteen years to life imprisonment.

On appeal to the Appellate Division, Morales argued that the trial court's refusal to permit him to cross-examine Simonetti concerning her knowledge of the Roth Report and the exclusion of his proposed expert testimony was in violation of New York law and denied him the fair trial required by the Due Process Clause of the Fourteenth Amendment. Morales also contended that the court had erroneously conducted a *Sandoval* hearing in his absence.[4] The appellate division's written opinion only analyzed Morales's *Sandoval* claim. With respect to the arguments he pursues in this petition, the Appellate Division stated, "The defendant's remaining contentions lack merit."

4. A *Sandoval* hearing is a hearing through which a defendant may obtain a prospective ruling as to the scope of his cross-examination concerning prior criminal offenses and other misconduct, on the basis of which he will decide to take the witness stand. *See People v. Sandoval*, 34 N.Y.2d 371, 357 N.Y.S.2d 849, 314 N.E.2d 413 (N.Y.1974).

*Appendix B*

Morales sought leave to appeal this decision to the New York Court of Appeals, but leave was denied on December 1, 2003. His conviction became final ninety days later on February 29, 2004, when the time for petitioning the Supreme Court for a writ of certiorari expired. He filed this petition on February 28, 2005. His petition challenges his conviction for burglarizing the Tompkins Avenue apartment.

*Discussion*

28 U.S.C. § 2254(d) provides:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim —
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> >
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding

"Clearly established Federal law" refers to the decisions of the U.S. Supreme Court rendered prior to the time of the relevant state-court decision. *Williams v. Taylor*, 529 U.S. 361, 412 (2000); *Green v. Travis*, 414 F.3d 288, 2005 WL

1581265, __ F.3d __ (2d Cir.2005). A state prisoner may not be granted habeas relief based on an unreasonable or erroneous application of authority of a Federal Court of Appeals. *Yung v. Walker*, 341 F.3d 104, 110 (2d Cir.2003).

"A state-court decision is 'contrary' to established federal law withing the meaning of § 2254(d)(1) if it is 'diametrically different' from, 'opposite in character or nature' to, or 'mutually opposed' to the relevant Supreme Court precedent. *Henry v. Poole*, 409 F.3d 48, 68 (2d Cir.2005) (quoting *Williams*, 529 U.S. at 405). To be "contrary to" clearly established federal law, a state court's conclusion of law must be opposite to a conclusion reached by the Supreme Court or resolved differently on a materially indistinguishable set of facts. *Williams*, 529 U.S. at 413.

A state court's decision is an "unreasonable application" of a Supreme Court holding "if the state court identifies the correct governing legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Williams*, 529 U.S. at 413. The issue is not whether all reasonable jurists would agree that there was error, but rather that there was "some increment of incorrectness beyond" mere error. *Howard v. Walker*, 406 F.3d 114, 122 (2d Cir.2005) (quoting *Williams*, 529 U.S. at 411). "[T]he range of reasonable judgment can depend in part on the nature of the relevant rule." *Yarborough v. Alvarado*, 541 U.S. 652, 124 S.Ct. 2140, 158 L.Ed.2d 938 (2004). The more general the rule in question, the more leeway the state court has in making case-by-case determinations. *Id.* at 2149.

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State court factual findings are, in this context, presumed to be *correct*. 28 U.S.C. § 2254(e)(1). This presumption can only be rebutted by clear and convincing evidence. *Id.*

Where the trial court provides a reason for rejecting the claim, and the state appellate court summarily affirms, federal courts employ a rebuttable presumption that the state appellate court's "later unexplained orders upholding [the trial court's] judgment . . . rest upon the same ground" as the trial court's. *Serrano v. Fischer*, 412 F.3d 292, 2005 WL 1427298,-F.3d-(2d Cir.2005) (quoting *Ylst v. Nunnemaker*, 501 U.S. 797, 803, 111 S.Ct. 2590, 115 L.Ed.2d 706 (1991)).

The trial court did not explicitly identify the state evidentiary rule pursuant to which the questioning of Simonetti was curtailed or pursuant to which Morales's expert was excluded. It is, however, apparent from the transcript that the evidence was excluded because the danger of prejudice outweighed the evidence's slight probative value.

New York evidentiary law on this subject mirrors federal law. *See People v. Scarola*, 71 N.Y.2d 769, 530 N.Y.S.2d 83, 525 N.E.2d 728 (N.Y.1988). To be admissible, expert testimony must be relevant to the issues of fact of the individual case. *People v. Smith*, 784 N.Y.S.2d 923 (N.Y.Sup.Ct.2004); *People v. Veloz*, 298 A.D.2d 213, 748 N.Y.S.2d 554 (N.Y.App.Div.2002). New York law permits a court to limit cross-examination to relevant matters. *People v. Straniero*, 17 A.D.3d 161, 162, 792 N.Y.S.2d 466 (N.Y.App.Div.2005); *People v. Ashner*, 190 A.D.2d 238, 246, 597 N.Y.S.2d 975 (N.Y.App.Div.1993). An expert may not be impeached using publications that she neither used in

preparing her opinion nor considers authoritative *Lipschitz v. Stein*, 10 A.D.3d 634, 635, 781 N.Y.S.2d 773 (N.Y.App.Div.2004). The admission of such publications or testimony about their contents constitutes introduction of impermissible hearsay. *Id.* Here there was no indication that either experts in fingerprint identification relied on the Roth Report, that Simonetti had considered it, or that she considered it authoritative. Absent this foundation, questioning concerning the Report was of minimal probative value. As the state trial judge noted, there was no evidence that the fingerprint at issue in this case was lifted and planted. Introduction of Morales' expert's testimony about planting fingerprints or questioning concerning the Report created substantial risk of jury speculation that the prosecution's proof was similarly tainted. *Cf. People v. Davis*, 43 N.Y.2d 17, 400 N.Y.S.2d 735, 371 N.E.2d 456 (N.Y.1977) (evidence that statement by potential prosecution's witness, who was not called, was made under duress was properly excluded because it would suggest that testimony that was presented was also obtained under duress).

Morales contends that the expert's testimony was relevant on the issue of the Investigating Officer Michael Curtis' credibility, particularly after the officer testified that the fingerprint found at the scene of the crime was not photographed before it was collected and the glass on which it was found was not preserved in evidence.[5] But there was no evidence that the failure to photograph or preserve the champagne glass was a deviation from standard police

5. Morales does not argue that the failure to preserve the glass denied him due process. Nor was such an argument presented to the state courts.

practice. Even considering the testimony relevant on this issue, its probative value outweighed its prejudicial potential

Although the state court's evidentiary rulings were within the bounds of a trial court's discretion as a matter of state (and federal) evidentiary law, the question on habeas review is whether the rulings were contrary to the United States Constitution. Accordingly, I consider whether the ruling was contrary to clearly established federal law, and whether it was an unreasonable application of that law.

Morales contends that the trial court's exclusion of expert testimony concerning the ability to plant fingerprint and the limitation on his ability to cross-examine Simonetti concerning the Roth Report were in violation of clearly established federal law. Although he does not state precisely what Supreme Court authority he relies upon, he cites several cases for the proposition that a defendant has the right to present a meaningful defense and to cross-examine witnesses against him, including *Washington v. Texas*, 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967), *Chambers v. Mississippi*, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973), *Pointer v. Texas*, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965), and *Crane v. Kentucky*, 476 U.S. 683, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986).

The state court's decision at issue here is not contrary to any of the cases cited by Morales since each is readily distinguishable. *Pointer* involved the introduction of transcripts of testimony at a pretrial hearing at which the defendant was not represented by counsel. Morales was represented by counsel, and no transcripts of testimony were

introduced. *Washington* and *Chambers* concerned the introduction of evidence and testimony of confessions, bearing substantial indicia of reliability, by others who claimed to have committed the crime in question. No confessions or testimony of witnesses with personal knowledge are at issue in this case. Nor did Morales's trial involve the introduction of his own confession or the circumstances surrounding the interrogation that produced it, unlike *Crane v. Kentucky*, 476 U.S. 683, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986). In short, none of the cited cases concern the exclusion of testimony because the defendant failed to lay a foundation for its admission or because the trial judge concluded that it was substantially more prejudicial than probative. The state court's decision was, accordingly, not "contrary to" *Chambers*, *Crane*, *Pointer*, or *Washington*. Nor, did the state court unreasonably apply the holdings of those cases.

The federal law identified by Morales, which is common to the holdings in *Crane*, *Chambers*, *Pointer*, and *Washington*, is that a court may not arbitrarily and irrationally apply evidentiary rules in a mechanical fashion to exclude material, reliable, exculpatory evidence. This holding states, however, the sort of general rule, the meaning of which emerges through application over time. Evidentiary rulings of the type made by the state court judge here by their nature require a balancing of competing interests. Reconciling evidentiary rulings and the Constitution in specific cases calls for "a substantial element of judgment." *Yarborough*, 124 S.Ct. at 2149. The substantial degree of judgment required by the decisions that Morales challenges means that AEDPA provides a state court with a greater degree of leeway than it

would otherwise enjoy when applying more specific legal rules. *See Serrano v. Fischer*, 412 F.3d 292, 2005 WL 1427298, __ F.3d __, (2d Cir.2005) ("In such circumstances, where the governing rule remains so roughly defined, we are less likely to conclude that a given interpretation or application of Supreme Court law is 'contrary to' or an 'unreasonable application of' Supreme Court precedent . . .").

In this case, the trial court foreclosed additional questioning of Simonetti about the Roth Report after she testified that she was unfamiliar with its contents. The witness had testified that she lacked knowledge of the report. There was no evidence that she relied on the Roth Report in forming her opinions or considered it an authoritative source. An expert cannot testify concerning a matter to which she has no knowledge. Because she lacked knowledge about the Report, the trial court's preclusion of additional "repetitive or only marginally relevant" questioning that lacked foundation was not an unreasonable application of Supreme Court precedent.[6]

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6. At oral argument, Morales' counsel relied on the Second Circuit's recent opinion in *Howard v. Walker*, 406 F.3d 114 (2d Cir.2005). Howard was convicted of murder in the second degree when the occupant of a house he and two accomplices were burglarizing died. After their arrest, Howard's accomplices told police that Howard grabbed the elderly victim and placed her in a chair and would not give her medicine that she requested. She thereafter had a heart attack and died. *Id.* at 117. The trial court excluded the co-defendants' confessions from their joint trial pursuant to *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968) (holding that admission of co-defendant's confession in joint trial violates the Confrontation Clause because of defendant's inability

(Cont'd)

*Appendix B*

*Exclusion of Expert Testimony*

The trial judge refused to allow Morales to call an expert witness on lifting and planting fingerprints in the absence of any foundation that the fingerprint in question had been planted. Morales contends that this evidence was relevant to impeach the credibility of Simonetti, who had testified that to her knowledge fingerprints could not be moved, and to prove that Morales' fingerprint had, in fact, been lifted and planted.

Morales claim fails because he cannot establish that the state court mechanically or arbitrarily excluded reliable evidence. First, contrary to Morales' assertion the evidence was not admissible to impeach Simonetti. On direct examination, Simonetti testified that the fingerprint in question matched Morales'. It was only on cross-examination that Morales elicited from her the statement that, to her knowledge, fingerprints could not be moved. It is well established that extrinsic evidence is not admissible to impeach a witness on collateral matters. *See* Fed. R. Civ.

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to cross-examine co-defendant). The trial court did, however, permit an expert witness called by the prosecution to rely on these statements in forming his opinion as to the cause of death. The trial court then ruled that if Howard cross-examined the expert concerning the basis for his opinion, he would "open the door" to the admission of his co-defendants' confessions. The Second Circuit ruled that this required Howard to make the constitutionally impermissible choice between his right to cross-examine the opposing witness or his right to exclude the unreliable hearsay of a co-conspirator. *Id.* at 129. Morales was not presented with such a constitutionally impermissible choice.

Pro. 608(b); *United States v. Antonakeas*, 255 F.3d 714, 724 (9 Cir.2001). The Supreme Court has not interpreted the Confrontation Clause "to encompass the right to impeach an adverse witness by putting on a third-party witness." *Harrington v. Jackson*, 1 Fed.Appx. 367 (6 Cir.2001).

The Supreme Court has similarly recognized that a state has a legitimate interest in preventing mini-trials on collateral issues. *United States v. Scheffer*, 523 U.S. 303, 314, 118 S.Ct. 1261, 140 L.Ed.2d 413 (1998). The Constitution provides states with "broad latitude . . . to establish rules excluding evidence from criminal trial . . . so long as they are not 'arbitrary' or 'disproportionate to the purposes they are designed to serve." ' *Scheffer*, 523 U.S. at 308. Precluding testimony concerning the ability to move fingerprints merely to impeach Simonetti's credibility falls well within Constitutional bounds. *See United States v. Walker*, 930 F.2d 789, 791-92 (10 Cir.1991) (no constitutional violation where trial court prevented defendant from calling witness merely to impeach another witness's testimony); *Klemp v. Renico*, 04-CV-71862, 2005 WL 1076249, at *14-15 (E.D.Mich. Apr.19, 2005) (no constitutional violation where trial court prevented defendant from impeaching witness on a collateral matter).

Morales next contends, that the expert's testimony should have been admitted because it was relevant to whether the fingerprint at issue was planted. The trial court excluded the testimony on the grounds that Morales failed to lay a foundation that the fingerprint in question had been lifted and planted. The trial court determined that expert testimony

that such a process was possible was only relevant had Morales offered some evidence it had in fact occurred.[7]

Contrary to Morales' claim, the cases he cites to do not stand for the proposition that a defendant's due process rights are violated any time a state court excludes evidence that the defendant believes is relevant to his defense. Instead, they merely prohibit arbitrary rules that mechanically exclude evidence. *See Alley v. Bell*, 307 F.3d 380, 395 (6 Cir.2002); Janet C. Hoeffel, *The Sixth Amendment's Lost Clause*, 2002 Wis. L.Rev. 1275, 1289 (2002) ("[I]f the evidentiary rule has a rational basis-namely a concern for trustworthy or reliable evidence-then the Constitution goes no further"). Requiring a defendant to lay a foundation for the admission of evidence is not the sort of mechanical exclusion of evidence prohibited by *Chambers or Washington. See Chambers*, 410 U.S. at 302 (observing that defendant "must comply with established rules of procedure and evidence designed to assure both fairness and reliability"). Indeed, the right to introduce evidence in defending against

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7. Morales' defense theory that his fingerprints that were on file were planted on the champagne glass is not particularly persuasive. According to the Roth Report, there was no need for the police to plant a fingerprint on the champagne glass because they could have just as easily taken one of Morales's prints from their file and provided it to Simonetti, without the need for planting it on a glass that was not, in any event, preserved as evidence. *See* Roth Report 5-6. Presentation of this more plausible theory would not have required an expert on planting fingerprints because it does not assume that any print was actually planted. *See, e.g.*, Roth Report 66, 71, 80, 90, 102-06, 108-10 (discussing various cases involving fabrication of latent fingerprints from ink fingerprints on file).

a criminal charge is subject to reasonable restrictions. *United States v. Scheffer*, 523 U.S. 303, 308, 118 S.Ct. 1261, 140 L.Ed.2d 413 (1998); *Taylor v. Illinois*, 484 U.S. 400, 410, 108 S.Ct. 646, 98 L.Ed.2d 798 (1988). Those restrictions do not violate the Constitution so long as they are not arbitrary or disproportionate to the purpose they are designed to serve. *Scheffer*, 523 U.S. at 308.

It was not an unreasonable application of Supreme Court precedent to conclude that the application of the evidentiary rule in this case was not disproportionate, arbitrary, or mechanical. The trial court imposed no blanket, per se exclusion of evidence. Instead it considered the proffered evidence individually to determine if an adequate foundation had been laid. Nor was it arbitrarily applied in an asymmetrical fashion; it limited both the prosecution and defense alike. *Cf. Washington*, 388 U.S. at 24 (Harlan, J., concurring) (noting that the evidentiary rule at issue in that case would not have barred the prosecution from presenting the same testimony). Finally, requiring that a foundation be laid prior to the admission of evidence is not disproportionate to the confusion and speculation that could potentially result. Instead, the court merely required Morales to establish that the evidence was relevant by laying a sufficient factual predicate for its admission. Such a foundation might have been laid by evidence that Simonetti had been presented with a fabricated fingerprint card, that the police did not follow standard procedures in lifting the print, that the glass from which the print had been lifted had been wiped clean prior to the police discovering a print on it, or testimony of an expert witness that aspects of this print suggested that it had been planted. Requiring such a foundation cannot be said to

be an unreasonable application of *Pointer*, *Crane*, *Chambers*, *or Washington*. *Cf. Tafoya v. Tansy*, 9 Fed.Appx. 862 (10 Cir.2001) (unpublished) (counsel not ineffective for failing to call expert witness on planting fingerprints, absent any evidence that the defendant's fingerprints were planted); *Dell v. Straub*, 194 F.Supp.2d 629, 651 (E.D.Mich.2002) (same).[8] The trial court could reasonably conclude that the

8. Morales relies in on the pre-AEDPA decision *Ronson v. Commissioner of Correction of the State of New York*, 604 F.2d 176 (2d Cir.1979). In *Ronson*, the defendant sought to present expert psychiatric testimony relevant to an insanity defense. *Id.* at 177. He did not, however, comply with a state procedural rule requiring that notice be given to the prosecution when an insanity defense will be presented so that the state may have the defendant examined by its own doctors. Accordingly, the testimony was excluded, and Ronson was convicted. *Id.* at 177-78. The Second Circuit, applying the pre-AEDPA standard of review, held that the failure to grant a continuance so that the state could examine the defendant and the expert testimony presented violated Ronson's Sixth Amendment rights. The Second Circuit explicitly noted that the excluded testimony was "relevant and material." The state's interest in receiving notice of the defense could have been adequately accommodated and the indisputably relevant evidence admitted had a continuance been granted. The testimony that Morales sought to introduce was only *conditionally* relevant. The legitimate state interest in limiting trials to the presentation of relevant evidence could not have been accommodated by a continuance, or anything short of a foundation for the evidence Morales sought to introduce. Finally, *Ronson* applied the pre-AEDPA *de novo* standard of review. The Court did not ask whether the state court's application of clearly established federal law was unreasonable.

Morales also cites a post-AEDPA decision, *Noble v. Kelly*, 89 F.Supp.2d 443 (S.D.N.Y.2000), *aff'd* 264 F.3d 93. Noble was charged

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opposite ruling would have invited the jury to speculate concerning the existence of evidence that the fingerprint in this case was, in fact, tampered with.

*Certificate of Appealability*

Federal Rule of Appellate Procedure 22(b)(1) requires a habeas petitioner to obtain a certificate of appealability ("COA") before taking an appeal from the denial of his petition. To be entitled to a COA, a petitioner must make a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Such a substantial showing is made where jurists of reason would find it debatable whether the petition states a denial of a constitutional right. *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S.Ct. 1595, 146 L.Ed.2d

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with a shooting outside of a bar. At trial, he sought to introduce the testimony of one of the bar's patrons to the effect that Noble was inside the bar with him playing a video game. *Id.* at 448. The trial court excluded this testimony because Noble had not provided notice of his intent to rely on an alibi defense as required by state law. *Id.* at 449. The federal district court found this to be an unreasonable application of the Supreme Court decision *Taylor v. Illinois*, 484 U.S. 400, 108 S.Ct. 646, 98 L.Ed.2d 798 (1988), which pertains to the exclusion of exculpatory evidence as a discovery sanction. *Id.* at 454. The evidence in *Noble* was directly relevant to the defendant's guilt or innocence. The case at bar, involves evidence that was only conditionally relevant upon the showing of an adequate foundation. No evidence was excluded as a discovery sanction. The holding of *Noble* has subsequently limited by *Wade v. Herbert*, 391 F.3d 135 (2d Cir.2004) (declining to grant habeas relief where state court declined to permit evidence of an alibi defense because of defendant's late notice).

542 (2000). The COA, if issued, must indicate which specific issue satisfies the statutory standard. 28 U.S.C. § 2253(c)(2). Although I have concluded that the exclusion of Morales' expert witness is not an unreasonable application of Supreme Court precedent, the conclusion is sufficiently debatable to justify the issuance of a COA with respect to the issue whether the exclusion of Morales' expert witness and the limitations placed on his cross-examination of Simonetti were unreasonable applications of federal law.

*Conclusion*

For the foregoing reasons, the petition for habeas corpus is denied and a certificate of appealability is granted.

The Clerk is directed to furnish a filed copy of the within to all parties and to enter judgment denying the petition.

SO ORDERED.

Dated: Brooklyn, New York
September 29, 2005

By: /s/ Charles P. Sifton (electronically signed)
United States District Judge